In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1017

JAMES A. RHODES,
Petitioner,
vs.
ARTHUR KRAUSE, et al.,
Respondents.

No. 77-1018

SYLVESTER DEL CORSO, et al.,
Petitioners,
vs.
ARTHUR KRAUSE, et al.,
Respondents.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTIONS PRESENTED

I. SHOULD THIS COURT REVIEW THE DECISION BELOW, WHICH FOLLOWS THIS COURT'S PRECEDENTS AND IS NOT IN CONFLICT WITH DECISIONS IN ANY OTHER CIRCUIT, REGARDING REMAND FOR NEW TRIAL BECAUSE OF THE ACTIONS BY THE TRIAL COURT AFTER A JUROR WAS THREATENED?

II. SHOULD THIS COURT REVIEW THE EVIDENCE AND THE DETERMINATIONS OF THE TWO LOWER COURTS DENYING DEFENDANTS RHODES AND DEL CORSO DIRECTED VERDICTS?

III. DOES THE KILLING AND WOUNDING OF UNARMED STUDENTS BY NATIONAL GUARDSMEN, IN THE COURSE OF DISPERSING AN ASSEMBLY, GIVE RISE TO A CAUSE OF ACTION UNDER 42 U.S.C. § 1983?

REASONS FOR DENYING THE WRITS

Introduction and Summary

The respondents, 1/ who were plaintiffs below, are the nine wounded students (or, where appropriate, their parents as guardians ad litem) and the personal representatives of the estates of the four students who were killed. They filed their actions in the United States District Court for the Northern District of Ohio seeking compensatory and punitive damages, alleging deprivations of civil rights under the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983, and alleging

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1/ Hereinafter, for clarity, respondents will be called plaintiffs and petitioners will be called defendants.

pendent claims based upon negligence, assault and wrongful death. The thirteen cases were consolidated for trial.

The petitioners, who were defendants below, are the Ohio National Guardsmen who fired a thirteen-second fusillade into the crowd of students; their officers at the scene; the Adjutant General of the Ohio National Guard (Del Corso); and the Governor of Ohio (Rhodes).

The trial was conducted for nearly fifteen weeks, commencing on May 19, 1975, and continuing until the jury returned its verdicts on August 27, 1975. After entry of judgments on the jury verdicts for all the defendants, plaintiffs appealed. Plaintiffs argued that (1) the jury verdicts on the claims for wrongful woundings and killings were unsupported by substantial evidence; (2) the evidence on the First Amendment claims required a directed verdict for plaintiffs; (3) the jury verdicts were tainted by intrusions on the jury that were improperly handled by the district court; (4) prejudicial errors in the jury charge required reversal; and (5) erroneous rulings on evidence severely prejudiced the plaintiffs.

The Court of Appeals for the Sixth Circuit reversed and remanded for a new trial because of the trial judge's improper handling of a jury intrusion. In a separate concurring opinion, Judge Edwards stated he would reverse in addition because some of the trial judge's actions themselves constituted a prejudicial jury intrusion. Petitioners' Joint Appendix at A 33 to A 35. 2/

2/ Hereinafter cited as "PJA at A __."

Plaintiffs' First Amendment and Eighth Amendment claims were ordered dismissed by the Court of Appeals. The Court of Appeals also held that neither the plaintiffs nor the defendants were entitled to a directed verdict on the due process and pendent state claims. PJA at A 19. The Court of Appeals also explicitly stated that plaintiffs' other contentions concerning jury charge and trial errors would not be dealt with in detail but only as necessary to avoid error at another trial. PJA at A 3, A 17 and A 19.

After a majority of the Court of Appeals denied defendants' petitions for rehearing and suggestions of rehearing en banc, defendants petitioned this Court for writs of certiorari. Defendant Rhodes (No. 77-1017) asserts that excessive force does not constitute a denial of due process under 42 U.S.C. § 1983 and also that he is entitled to judgment on the record. Defendants Del Corso, et al. (No. 77-1018), assert that the Court of Appeals imposed too harsh a standard on the trial court for dealing with jury intrusions and that the Sixth Circuit's decision is in conflict with a Second Circuit decision dealing with jury intrusions. Defendant Rhodes joins in this contention. Defendant Del Corso also asserts that he is entitled to judgment on the record.

Plaintiffs submit that none of the issues presented by the defendants is suitable for review by this Court. At present, the case presents essentially factual questions, with no recurring unresolved issues of law. And, on the merits, the defendants are wrong as to each issue they press. Moreover, even if the defendants were to prevail on their

issues, they still might not be entitled to an order affirming the district court's judgments in their favor.

Furthermore, the case and the issues are not in a proper posture for this Court's treatment. For example, review of the defendants' issues at this time would bring before the Court the numerous other issues presented by plaintiffs in the Court of Appeals, and would require this Court to review the extensive record in this case to resolve all these issues. Notably, if certiorari were granted on defendants' petitions, plaintiffs would be entitled to support the Court of Appeals judgment remanding for a new trial by urging any argument supporting that judgment that is raised in the record and was preserved in the appeal. Swarb v. Lennox, 405 U.S. 191, 202 (1972) (White, J. concurring) and 204 n.1 (Douglas, J. dissenting); Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970); Mills v. Electric Autolite Company, 396 U.S. 375, 381 n.4 (1970); United States v. Raines, 362 U.S. 17, 27 n.7 (1960); Langnes v. Green, 282 U.S. 531, 535-39 (1931); United States v. American Railway Express Company, 265 U.S. 425, 435-36 (1924). See Stern, "When to Cross-Appeal or Cross-Petition -- Certainty or Confusion?" 87 Harv.L.Rev. 763 (1973-1974).

In support of the Court of Appeals judgment, plaintiffs would argue before this Court that the Court of Appeals erred in ruling against them on several issues. If they are correct on these points, plaintiffs would still be entitled to a new trial. These issues include, inter alia, plaintiffs' contentions that: (I) There was no substantial evidence to sustain the jury

verdicts for the claims based upon wrongful killings and woundings; (2) the trial court should have granted a directed verdict on plaintiffs' First Amendment claims and placed that verdict before the jury in connection with plaintiffs' other claims; (3) the trial court committed reversible error by refusing plaintiffs' motion to dismiss with prejudice their state law claims, thereby causing the trial court to deliver a prejudicially prolix and incomprehensible jury charge.

Plaintiffs would also assert before this Court the numerous other serious issues they raised in the Court of Appeals, which that court delined to reach. If plaintiffs are correct in their arguments on these additional issues, they still would be entitled to a new trial. These issues include, inter alia, numerous incorrect and prejudicial rulings on evidence that are strikingly inconsistent with the new Federal Rules of Evidence. Assuming arguendo that the defendants were to prevail on the issues they are attempting to bring before this Court, and the Court agreed with the Court of Appeals on each of the other issues that court decided against the plaintiffs, this Court would then either address plaintiffs' unresolved questions or it would remand to the Court of Appeals with directions that it decide those issues. Powell v. McCormack, 395 U.S. 486, 500 n.16 (1969); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 704 (1967). If they were to prevail on any of these issues, the plaintiffs would still be entitled to a remand for a new trial.

Moreover, if defendants were to prevail in this Court only on the jury intrusion issue, it is most probable that the case would still have to be remanded to the district

court for evidentiary proceedings on that issue. See Del Corso Pet. No. 77-1018 at p. 14. A new trial might still be ordered and further appellate proceedings certainly would occur. Thus, in effect, the defendants seek interlocutory review of the case.

This Court has rarely granted a writ of certiorari to review a reversal by a court of appeals for abuse of discretion, where the court of appeals also remanded for new trial. This is true partly because of the necessity to preserve this Court's resources when a lower court may dispose of a case or issue. See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967) (case unripe because of remand order on major issue); Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 258 (1916) (certiorari originally denied because of remand).

Research by plaintiffs' counsel reveals that virtually all of the cases in which this Court has granted a writ of certiorari after a court of appeals has reversed for abuse of discretion and remanded for new trial, have involved the peculiar problems of the role of the jury as factfinder under the Seventh Amendment, often in the Federal Employers' Liability Act context. This Court has explained its extraordinary review of such cases:

> Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their

right to a jury determination.

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 510 (1957). The case at bar does not present the problems which arise in such litigation. The Court of Appeals action in the instant case evinces no disrespect for the jury. Indeed, remand for a new trial is necessary in this case to assure fair jury determinations.

The Court of Appeals remand for new trial as a result of the District Court's improper handling of the jury intrusion raises no important issue for this Court's determination. Settled law was followed. Moreover, there is no conflict with the Second Circuit decision cited by defendants, which is inapposite on its facts.

Defendants Rhodes' and Del Corso's requests for review of the denial of directed verdicts to them presents a factual matter with no importance except to the parties involved. Two lower courts have reviewed the record and each of them has concluded that there is sufficient evidence to go to the jury. The legal issues involved have been clearly resolved by numerous decisions of this Court, which were properly followed by the lower courts. Notably, the standard governing executive immunity from Section 1983 liability has already been fashioned.

Defendant Rhodes' question of whether excessive force gives rise to a Section 1983 claim, presents a frivolous issue. There is no inconsistency with the decisions of this Court; this Court has concluded, and all circuit courts which have passed upon the

issue have held, that excessive force gives rise to a claim under Section 1983.

Plaintiffs submit that the case should be remanded immediately for retrial on the relatively narrow issues now framed by the Court of Appeals, centering around the question "whether excessive force was employed" under the conditions that pertained on May 4, 1970. PJA at A 20.

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE COURT OF APPEALS CORRECTLY APPLIED SETTLED PRECEDENT IN ORDERING A NEW TRIAL AFTER THE TRIAL COURT GROSSLY MISHANDLED A JURY INTRUSION.

Defendants argue that the decision of the Court of Appeals to reverse for abuse of discretion and remand for new trial is inconsistent with this Court's decisions and in conflict with a decision by the Court of Appeals for the Second Circuit. This simply is not so.

On August 20, 1975, after more than thirteen weeks of trial, the trial judge called counsel to his chambers and announced that:

> [A]t least one of the jurors has been approached on several occasions and threatened and actually physically assaulted in connection with the threats; threats have been made on his family, if he doesn't bring in

a verdict in a certain way.

TR. 11,887. 3/ Counsel for plaintiffs asked for interrogation of the juror by the trial court. Tr. 11,893, PJA at A 23; TR 11,898-11,899, PJA at A 24. The trial judge brushed the request aside, indicating that the juror in question could be replaced by an alternate. Tr. 11,896; TR 11,902, PJA at A 23. His major concern was protection for the rest of the jury, which could be provided only by sequestration for the balance of the trial and deliberations. TR. 11,888-11,889, PJA at A 21-A 22; TR. 11,899, PJA at A 24; TR. 11,902-11,903, PJA at A 26; TR. 11,907, PJA at A 27.

No counsel objected to the in-chambers proceeding. All accepted the facts to be true as reported by the United States Marshal, who had interviewed the juror, and United States Attorney: that the juror had been approached on several occasions, threatened and physically assaulted, and threatened with harm to his family if he did not bring in a specified verdict (TR. 11,887); that there were three approaches to the juror, including one in which the juror was grabbed and pushed back against a wall and warned that he better not find the verdict the wrong way (TR. 11,891); that the threats included a threat to the life of the juror and a threat to blow up his house (TR. 11,898); that one approach occurred in the area of the Courthouse itself, and there was a witness to the actual (TR. 11,903-11,904); and that the Marshal's office had placed the juror under guard and the FBI was commencing an investigation (TR. 11,887).

3/ "TR. _____" citations refer to the Trial Transcript.

The trial judge decided to sequester the jury as soon as they had an opportunity to go home and pack. Over plaintiffs' counsel's vigorous objections (TR. 11,909-11,910, PJA at A 28-A 29; TR 11,912, PJA at A 29-A 30; TR 11,922, PJA at A 33), the trial judge resolved to inform the rest of the jury about the threats in order to explain the reason for the "eleventh-hour" sequestration (TR. 11,907, PJA at A 27; TR. 11,916, PJA at A 30). He also decided to replace the threatened juror with an alternate when the jury retired for deliberation. TR. 11,916-11,919, PJA at A 30-A 31. After the charge to the jury had been read, the judge changed his mind and allowed the juror to deliberate on the case. TR. 12,519-12,520.

The trial judge never spoke with the threatened juror (TR. 11,897, PJA at A 23), nor did he poll the rest of the jury panel to learn whether they had heard of the threats or had been threatened themselves. Instead, the trial judge ordered all parties and observers to leave the courtroom. Then, with only the jurors, counsel and the court reporter present, the judge left the bench and stood before the jury box (where he could speak more softly so as not to be heard outside the courtroom) and delivered a chilling speech to the jury, which was itself a substantial and unduly frightening intrusion upon the entire jury. TR. 11,931-11,947.

The full text of this speech is reprinted in the concurring opinion of Judge Edwards below. PJA at A 33-A 35. In it, the trial judge recited as an established fact that the life of one of the jurors had been threatened in an attempt to influence

the verdict. As to the rest of the jurors, therefore, it was immaterial whether any such threat had actually occurred; they were told by the judge that the threats had in fact occurred. The judge stated that he personally was "much troubled and disturbed" by knowledge of the threats. He declared that on past occasions he had ignored such threats, and as a result he had "blood on [his] hands." (He had previously told all counsel that there was at least one person dead as a result of his failure to take such a threat seriously in the past. TR. 11,898, PJA at A 24.) He explained that the problems could not be solved merely by discharging the single juror known to have been threatened because others among the jurors might have been threatened, too. He explained he was going to give the threatened juror around-the-clock protection, but that he could not give the rest of the jurors that kind of protection, in spite of the gravity of the peril. Therefore, although he had never before sequestered a jury, he was sequestering this jury.

After this terrifying speech, one of the alternate jurors inquired of the judge about protection for that juror's family, and the judge replied that all he could do was provide a telephone number which a threatened family member might call. TR. 11,942-11,943. At the same time, the judge told the jurors that the alternates were like life insurance, essential in the event one of the other jurors met his or her demise. TR. 11,944-11,945.

Both the second intrusion, actually initiated by the trial judge and affecting the entire jury, and the first intrusion, the threats to the single juror, were

referred to in the majority opinion of the Court of Appeals. PJA at A 4. The obvious prejudicial impact of the second intrusion was relied upon by Judge Edwards in his concurring opinion as an independent ground of decision. PJA at A 33-A 35.

The facts of the first intrusion were established to the satisfaction of the trial judge and all counsel at the proceeding in chambers, which defendants themselves, at page 13 of the Del Corso Petition (No. 77-1018) characterize as a "hearing." Further, defendants submitted in their Petitions for Rehearing and Suggestions for Rehearing en banc in the Sixth Circuit that "the facts surrounding the threat [were] fully disclosed to the trial court and counsel for all parties...." Defendants-Appellees' Petition for Rehearing in Sixth Circuit at 17. The facts of the second intrusion, that of the trial judge, are matters of transcribed record in this case.

Thus, this case is different from Remmer v. United States, 347 U.S. 227 (1954) (hereinafter "Remmer I"). Defendants incorrectly rely upon Remmer I and Remmer v. United States, 350 U.S. 377 (1956) (hereinafter "Remmer II"). In Remmer I, this Court did remand to the district court for further proceedings as to the facts of the alleged jury intrusion, but that was only because the facts of the intrusion were not in the record. 347 U.S. at 229. In Remmer II, after the trial judge had ascertained the facts and had made his own judgment that the intrusion was harmless, this Court reviewed the factual record, reversed the trial court's judgment of harmlessness, and ordered a new trial. 350 U.S. at 380-82.

Remmer II is akin, therefore, to the instant case.

Similarly, the defendants incorrectly argue that there is a conflict between the Sixth Circuit's decision in the instant case and a decision of the United States Court of Appeals for the Second Circuit, United States v. Gersh, 328 F.2d 460 (2d Cir.), cert. denied 377 U.S. 992 (1964). Del Corso, et al., Petition (No. 77-1018) at 15-18. Defendants assert that in the instant case the plaintiffs knowingly waived their right to a recorded interrogation of the juror in the presence of all counsel. The defendants then contend that, under Gersh and two other circuit court decisions, if plaintiffs in fact waived their right to such a hearing, they are entitled neither to an evidentiary hearing nor to a new trial.

Gersh and the two other precedents cited by the defendants, however, are inapposite to the instant case. As the Sixth Circuit held after careful review of the record in this case, there was no knowing waiver by plaintiffs of their right to recorded interrogation of the threatened juror to determine whether he was unaffected by the threats. PJA at A 10-A 11. Plaintiffs repeatedly asked for such an interrogation and then reasonably relied upon the trial judge's declaration that he was going to excuse the threatened juror. PJA at A 3-A 4.

As soon as they were informed of the possibility that the juror had been prejudiced, plaintiffs took all steps required of them to request protective measures short of a mistrial or a new trial. These included requests for recorded interrogation

of the threatened juror by the judge, polling of all jurors in the event the judge informed them of the threats, and excusal of the threatened juror, as well as objection to the trial court's informing the jury of the reasons why they were being sequestered. PJA at A 4-A 5, A 24, A 28-A 30; TR. 11,893; TR. 11,898-11,899; TR. 11,909; TR. 11,910-11,913.

In contrast to the instant case, in Gersh, the defendants were first informed of the possibility that a juror was prejudiced immediately after the jury delivered its verdicts and was excused. The defendants' attorney took no action at that time. Five and one-half weeks later, at sentencing, he did not move for further proceedings by way of recorded interrogation of the juror in question and polling of the other jurors, which the Second Circuit concluded "would still have been entirely practicable." 328 F.2d at 464. He moved only for a new trial on the ground that a voir dire should have been conducted of the juror in question before the case went to the jury. Waiver certainly could be inferred from those circumstances. But, as the record demonstrates and the Court of Appeals held, in the instant case, plaintiffs did not waive their procedural rights; they asserted them at the earliest possible opportunity. And, it is not now "practicable" to conduct the necessary recorded interrogation of the jurors.

In addition, the known facts of the presumed jury intrusion in the Gersh case are not nearly so compelling as those in the instant case. Threats and an assault, directly linked to the outcome of the case, occurred in the instant case. The alleged

intrusion in Gersh involved uncompleted anonymous telephone calls to the forelady. On these sparse facts, so very different from those in the instant case, the Second Circuit held:

> Something more than the mere fact of an unknown and uncompleted contact with a juror is needed to call for vacating a judgment of conviction to permit a hearing which the appellants have not sought.

328 F.2d at 464.

United States v. Dozier, 522 F.2d 224 (2d Cir.), cert. denied 423 U.S. 1021 (1975) is also inapposite to the instant case. It involved no issue of jury intrusion, only an issue of juror competence because of religious scruples to pass judgment. Even on that issue, the proven and uncontested facts demonstrated the competence of the juror in question. Further proceedings would have been redundant.

United States v. Florea, 541 F.2d 568 (6th Cir. 1976), cert. denied 430 U.S. 945 (1977), is also inapposite. This case involved two possible jury intrusions.

The first alleged intrusion involved the agreed-upon presence of one of sixteen prosecution witnesses at the replaying to the jury of a taperecording that was in evidence. "After a review of all the evidence, [the Court of Appeals] conclude[d on the merits] that appellants were not deprived of a fair trial." 541 F.2d at 572. Even though it affirmed the convictions before it in that case, the court of appeals announced a per

se rule prohibiting any such contact in future cases.

The second intrusion in the Florea case involved an attempt to bribe a juror. Without informing the parties or their attorneys:

> The judge summoned a court reporter to transcribe the juror's statement as well as the judge's decision to (1) excuse Juror Number One and replace him with an alternate juror; (2) immediately sequester the jury; (3) not disclose to the parties the reason for the discharge; and (4) direct the FBI to undertake a full investigation.

541 F.2d at 572. Reviewing this record, which disclosed all the relevant facts of prejudice, the court of appeals was able to make a decision on the merits of the question of actual prejudice and "conclude[d] that under the circumstances of this case, appellants were not prejudiced because they were absent when the district judge excused Juror Number One, substituted an alternate, and sequestered the jury." 541 F.2d at 573.

In the instant case, no evidence was available to rebut the clear presumption of prejudice arising from the first jury intrusion, nor did the trial judge act to minimize the prejudicial impact. Reliable evidence cannot now be developed to rebut the presumption of prejudice, well over two years after the events.

Gersh, Dozier and Florea are different

from the instant case in yet another striking respect. In treating the alleged jury intrusions, not one of the other trial judges himself intruded upon the jury. In the instant case, the trial judge delivered his chilling speech which, as Judge Edwards observed, itself "simply went too far." PJA at A 33.

On the uncontested facts in this case, the Sixth Circuit's decision was so clearly correct under controlling legal standards that review by this Court is not called for. For example, it is well settled that:

> Private communications, possibly prejudicial, between jurors and third persons...are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox v. United States, 146 U.S. 140, 150 (1892). As the Sixth Circuit held (PJA at A 6), this rule that an improper jury intrusion is presumptively prejudicial is applied in civil as well as criminal cases, as indeed the Seventh Amendment mandates. E.g. Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593 (5th Cir. 1977); United States v. Harry Barfield Co., 359 F.2d 120, 124 (5th Cir. 1966); Paramount Film Distributing Corp. v. Applebaum, 217 F.2d 101 (5th Cir.), cert. denied 349 U.S. 961 (1954); Stiles v. Lawrie, 211 F.2d 188 (6th Cir. 1954); Southern Pacific Co. v. Klinge, 65 F.2d 85 (10th Cir.), cert. denied 290 U.S. 657 (1933). To overcome this presumption, the party seeking to avoid a new trial must demonstrate persuasively that the intrusion could not be harmful. See Remmer I, supra, 347 U.S. at 229;

United States v. Williams, 545 F.2d 47, 51 (8th Cir. 1976); United States v. Doe, 513 F.2d 709, 711 (1st Cir. 1975); United States v. Gersh, 328 F.2d 460, 464 (2d Cir.), cert. denied 377 U.S. 992 (1964).

When a court of appeals determines there is a possible prejudicial impact from a jury intrusion, remand for new trial is appropriate. Remmer II, supra; Marshall v. United States, 360 U.S. 310 (1959). See United States v. Betner, 489 F.2d 116 (5th Cir. 1974); United States v. Ferguson, 486 F.2d 968 (6th Cir. 1973).

No affirmative evidence has been presented, nor could it be, in the instant case, that the two jury intrusions were harmless. As the Court of Appeals held (PJA at A 12), remand now for the taking of evidence on that question would be pointless.

The first jury intrusion must now be taken to be prejudicial as a matter of law. Too much time has passed for the defendants to rebut the presumption of prejudice. The trial judge, having held a hearing and found that there had been a jury intrusion, never questioned the threatened juror or the other jurors as to whether they were prejudiced in fact, although asked to do so. PJA at A 3-A 4. See United States v. Pompanio, 517 F.2d 460 (4th Cir.), cert. denied 423 U.S. 1015 (1975) (failure to poll jury, new trial ordered). He also went back on his initial decision to excuse the threatened juror. PJA at A 4-A 5.

The Court of Appeals stated that it had considered ordering a remand for the trial court to take evidence on the question of whether the jury intrusion was harmless.

Recognizing that more than two years had passed since the incidents in question had occurred, the Court of Appeals correctly held:

> Even if questioning the jurors were permitted on the issue of whether the verdict was affected by the incidents, considering the problem of fading memories and natural reluctance of a juror to admit that he had been improperly influenced, we believe it would be impossible now for either the district judge or this court to conclude that the threat and assault disclosed by this record were harmless. Cf. Stiles v. Lawrie, supra, 211 F.2d at 190.

PJA at A 12.

Recent decisions by courts of appeals in three other circuits have also held that the passage of time and dimming memories requires new trials rather than remands for evidentiary hearings on the question of prejudice in jury intrusion cases. United States v. Rhodes, 556 F.2d 599 (1st Cir. 1977); United States v. Betner, 489 F.2d 116 (5th Cir. 1974); Mares v. United States, 383 F.2d 805 (10th Cir. 1967), cert. denied 394 U.S. 963 (1969).

A new trial is especially required in the instant case because of the second jury intrusion, the trial judge's terrifying speech. As Judge Edwards would have held, that jury intrusion was prejudicial as a matter of law. PJA at A 33-A 35. Every reported case of such improper intrusion by a judge in the jury process has resulted in

an order remanding for new trial. See Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593 (5th Cir. 1977); United States v. Gay, 522 F.2d 429, 435 (6th Cir. 1975); Marson v. United States, 203 F.2d 904 (6th Cir. 1953).

II.

THIS COURT SHOULD NOT REVIEW THE EVIDENCE WHEN REASONABLE MINDS COULD EASILY DIFFER AS TO THE LIABILITY OF DEFENDANTS RHODES AND DEL CORSO.

Defendants assert that defendant Rhodes is entitled to judgment on the record, and that defendant Del Corso also may not be held liable because on the record he can properly avail himself of "qualified immunity." The question before this Court is whether the decisions of two courts denying directed verdicts to defendants Rhodes and Del Corso (TR. 10,162-10,163; TR. 1,172-10,173; PJA at A 19) should be reviewed and overturned. In essence these defendants submit to this Court issues of fact, i.e., whether there is sufficient evidence of their liability to require a jury determination.

As the Court has stated many times: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Accord, General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1938); Houston Oil Co. of Texas v. Goodrich, 245 U.S. 440 (1918). This is generally so even if it appears the decision below is erroneous. See, e.g., "Work of the Federal Courts," address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v,vi; Mr. Justice Harlan, Manning the Dikes, 13 Record of N.Y.C.B.A. 541, 551 (1958).

This Court's practice of avoiding review of facts is buttressed by the so-

called "two-court" rule. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." Comstock v. Group of Institutional Investors, 335 U.S. 211, 214 (1948). See also Keyes v. School District No. 1, 413 U.S. 189, 198 n.9 (1973) and at 264 (Rehnquist, J. dissenting); Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972) and at 203-204 (Brennan, Douglas, Stewart, J. J., concurring in part and dissenting in part.). This rule rests not only upon deference to the trier of fact, but upon consideration of judicial economy. It applies to fact findings made in response to motions for directed verdicts. See Cole v. Ralph, 252 U.S. 286, 302 (1919).

In the instant case, the trial judge denied directed verdicts to defendants Rhodes and Del Corso. TR. 11,162-11,163; TR. 11,172-11,173. In passing upon the defendants' motions for directed verdicts, the district court found regarding Rhodes that:

> I have studied the record of this case, and I have studied the law and I have tried to figure out what the Supreme Court means in its decisions, and I have come to the conclusion that the evidence in this case does present a question of fact which must be submitted to the jury with respect to the liability of the Defendant Governor Rhodes.

TR. 10,162-10,163. Regarding Del Corso the District Court found that:

> I have been spending several hours each day for the past several weeks reviewing the law and reviewing the facts. . . . And I think there are questions that the jury has to answer as I read the record in this case.

TR. 10,172-10,173.

On appeal, the Court of Appeals reviewed the record and concurred with the District Court, holding that: "Neither the plaintiffs nor the defendants were entitled to a directed verdict on the due process and pendent state claims. Jury issues were presented...." PJA at A 19. Furthermore, the defendants, in their request for rehearing and suggestion for rehearing en banc, explicitly asserted that defendant Rhodes was entitled to judgment on the record, but a majority of the Court of Appeals denied rehearing, concluding that the issues raised therein were fully considered upon submission and decision of the case. PJA at A 36.

In denying directed verdicts, the District Court and the Court of Appeals each properly applied the standard for official immunity established in Scheuer v. Rhodes, 416 U.S. 232 (1974), as did the District Court in its instructions to the jury. TR. 12,480-12,482. Just as this Court said in Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976):

> The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial. (Citations omitted.)

With the case in this posture, defendants Rhodes and Del Corso can only be asking this Court to review the facts of the case and determine whether the Court of Appeals' decision regarding the weight of the evidence on the due process and pendent state claims was in error. Since the law on this subject is well established, this factual matter is of no importance except to the parties.

Defendants Rhodes and Del Corso are liable under Section 1983 because they made various decisions and took various actions which were intentional, wanton, reckless or negligent. These decisions and actions were taken with full knowledge of the violation of constitutional rights which would be caused thereby. These decisions and actions were directly and immediately within and affected the chain of causation leading to the actual denials of constitutional rights. Cf. e.g., Rizzo v. Goode, 423 U.S. 362, 373-376 (1976); Allee v. Medrano, 416 U.S. 802 (1974); Hague v. C.I.O., 307 U.S. 496 (1939).

For example reviewing the record in light of this Court's decisions in Gilligan v. Morgan, 413 U.S. 1 (1973) and Scheuer v. Rhodes, 416 U.S. 232, 249 (1974), the Court of Appeals correctly held that the record presented a justiciable controversy regarding the Ohio National Guard's "training, weaponry and orders...." to be decided by the jury. PJA at A 17- A 18. Defendant Del Corso, as Ohio's Adjutant General, and defendant Rhodes, as Ohio's Governor and the commander-in-chief of the Ohio National Guard, promulgated and/

or were responsible for the Guard's "training, weaponry and orders."

Considerable other evidence in the record causally links these two defendants to the tragic events of May 4, 1970.

Defendant Del Corso is the Adjutant General of the Ohio National Guard. 4/ He was present in Kent on May 2nd and 3rd, 1970. He prepared the Ohio Rules of Engagement, which deal with the use of loaded military weapons in civil disturbances. He was in charge of training, equipping and controlling the Guard. He joined in the decision to ban all assemblies, peaceful or otherwise. TR. 7,959-7,960; TR. 8,820-8,821; TR. 8,825-8,826; TR. 7,136; TR. 7, 968; TR. 8,089.

Defendant Rhodes is the commander-in-chief of the Ohio National Guard. He was present in Kent on May 3rd. He knew of the Ohio Rules of Engagement and the problem of overpowered weapons. He inflamed and incited the Guard to resort to unnecessary force on the Kent State campus. He took control of the campus in the face of his admitted lack of authority to do so, and then failed to exercise control over the Guard on campus. He promulgated the

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4/ Contrary to Defendants' contention at p. 19 of the Del Corso Petition (No. 77-1018) there are other cases in which an Adjutant General's liability has been submitted to a jury for determination, and liability was found. O'Shee v. Stafford, 122 La. 444, 47 So. 764 (1908). Cf. Fluke v. Canton, 31 Okla. 718, 123 P. 1049 (1912)(dictum).

ban on all assemblies, saying at a meeting on May 3rd, "I don't want to see any two students walking together." TR. 7,962; TR. 7,975-7,976; TR. 7,983-7,984; TR. 7,998-8,000; TR. 7,390; TR. 7,430; TR. 8,458; TR. 8,948-8,949; TR. 8,977-8,978; TR. 9,006-9,007; TR. 9015; TR. 8,884; Crt. Exh. #2; TR. 8,883.

A jury certainly could find that, individually and together, all these decisions and actions proximately caused the woundings and killings of students at Kent State without due process of law, as well as the violation of their First and Eighth Amendment rights. Defendants Del Corso and Rhodes cannot avail themselves of qualified immunity to take the issue of their liability away from the jury. Their actions illustrate their abuse of discretion and bad faith; they knew of the danger to life and First Amendment rights, yet they made no attempt to allay the danger. Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975).

It was not clearly erroneous for the two lower courts to have concluded that reasonable minds could easily differ as to defendants Rhodes's and Del Corso's liability based on the evidence. Therefore, this Court should not review the concurrent conclusions of two courts that directed verdicts for defendants Rhodes and Del Corso are not justified.

III.

THE KILLING AND WOUNDING BY THE OHIO NATIONAL GUARD OF UNARMED STUDENTS AT A PEACEFUL POLITICAL ASSEMBLY GIVES RISE TO A CAUSE OF ACTION UNDER 42 U.S.C. § 1983.

Defendant Rhodes argues that this Court should decide that excessive force does not constitute a denial of due process remediable under 42 U.S.C. § 1983. Defendant Rhodes seems to assert that the Court of Appeals should have dismissed the entire action, and by not doing so, the Court of Appeals has decided important questions in a manner inconsistent with the decisions of this Court.

This is a frivolous issue, never before raised by defendants. No decisions of this Court were contradicted by the decision of the Court of Appeals. It is impossible to imagine a case wherein a cause of action under Section 1983 would be more appropriate than the one at bar. As defendant Rhodes states at p. 15 of his Petition (No. 77-1017), "We of course do not contend that the Due Process Clause is implicated only when a state deprives a person of life, liberty or property in the course of punishing that person -- the reach of that Clause is much broader." Indeed, it is easily broad enough to reach the situation in this case. Defendant Rhodes's Petition's statement of facts left out of its denouement the fact that four students were killed by the 13-second fusillade and nine were wounded. These injuries give rise to the "excessive force" component of plaintiffs' claims. The Court

of Appeals reduced the Section 1983 claim to the denial of due process theory; plaintiffs continue to urge in support of their Section 1983 claims the additional theories that both their First and Eighth Amendment rights were also violated. 5/

As defendants must know, their contention that excessive force cannot be the basis of a claim under Section 1983 is frivolous. The tremendous weight of authority demonstrates that excessive force can be the basis for an action under Section 1983. The use of unreasonable or excessive force by a state official acting under color of state law has been held to provide the basis for a Section 1983 claim in ten of the eleven circuits, every circuit that has passed upon the issue. Carter v. Carlson, 447 F.2d 358, 361 (D.C. Cir. 1971), rev'd on other grounds, sub nom District of Columbia v. Carter, 409 U.S. 418 (1973); Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied 414 U.S. 1033 (1973); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965); Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Hamilton v. Chaffin, 506 F.2d 904 (5th Cir. 1975); Roberts v. Williams, 456 F.2d 819 (5th Cir.), cert. denied 404 U.S. 866 (1971);

5/ Plaintiffs agree with defendant Rhodes, at p. 16 of his Petition, that Ingraham v. Wright, 430 U.S. 651 (1977) does not control this case, but for a different reason. Ingraham is based upon facts too different from the case at bar to control with regard to the scope of Eighth Amendment protection.

Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975); Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975); Russ v. Ratliff, 538 F.2d 799, 804 (8th Cir. 1976), cert. denied 97 S.Ct. 740 (1977); MacDonald v. Musick, 425 F.2d 373 (9th Cir.), cert. denied 400 U.S. 852 (1970); Morgan v. Labiak, 368 F.2d 338 (10th Cir. 1966). This Court has certainly indicated its agreement. See, Screws v. United States, 325 U.S. 91 (1945).

Defendants have attempted to misread a recent case in this Court as overruling the consistent authority on this point. The dictum quoted at pp. 15-16 in the Rhodes Petition from Paul v. Davis, 424 U.S. 693 (1976) is inapplicable to the instant case. Paul held, in pertinent part, that reputation alone does not invoke the protection of the Due Process Clause, and thus a claim based on defamation is insufficient to sustain an action under 42 U.S.C. § 1983 and the Fourteenth Amendment. In dictum, this Court discussed the limitations on claims under Section 1983, that the injuries contested must be constitutional in scope. The examples the Court used to illustrate injuries not cognizable under Section 1983 were the accidental shootings of innocent bystanders and negligently-caused automobile accidents involving law enforcement officers. Plaintiffs' claims are not like these; they involve constitutional wrongs based upon intentional or reckless shootings of students by National Guardsmen. Such shootings, unlike the examples given in Paul, exhibit the "misuse of power" or the "raw abuse of power" that is the underlying concern of Section 1983. See Monroe v. Pape, 365

U.S. 167 (1961); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970). It is this misuse of power, apparent in the use of excessive force, that gives rise to constitutional injury and makes the damage claims herein appropriate under Section 1983.

Finally, contrary to defendants' assertions (Rhodes Petition No. 77-1017 at 17.), Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975), does not create a conflict with the case at bar. Jones does not hold that unreasonable force by a police officer does not give rise to a Section 1983 action. The court in Jones in fact clearly stated that excessive force does give rise to a Section 1983 claim. 528 F.2d at 139. Indeed, the Second Circuit has recently reaffirmed its view that excessive force gives rise to a Section 1983 claim. See Bellows v. Dainack, 555 F.2d 1105, 1106 n.1 (2d Cir. 1977).

Thus, there is no important question concerning Section 1983 and the use of excessive force which should be decided by this Court.

CONCLUSION

The instant case has been remanded to the District Court for retrial. The issues raised by defendants for review by this Court are not important questions of law which have not been, but ought to be, decided by this Court. In its present posture, the case involves essentially factual questions, and the Court of Appeals decision was based on trial errors that constituted abuse of discretion. The

decision of the Court of Appeals was not inconsistent with any decision of this Court. There is no conflict among the circuits on any issue of law raised by the defendants' petitions. Therefore, all the Petitions for Writs of Certiorari in this case should be denied.

Respectfully submitted,

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